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No. 02-1629

In the Supreme Court of the United States

CLARK COUNTY, NEVADA AND
MORGAN HARRIS,

Petitioners,

v.

ROBERTO MIRANDA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondent says that review of the Ninth Circuit's *en banc* decision is unwarranted because this case involves a "straightforward application" of the law to an "unusual" set of facts. Br. in Opp. 2, 6. Exactly the opposite is true. Review is needed because the *legal analysis* applied by the *en banc* majority to this *routine* set of facts is highly *unusual* – and in conflict with other circuits' (and this Court's) decisions.

Two threshold arguments against further review may be quickly dispatched. First, respondent asserts that the issues raised here are simply not "important." Br. in Opp. 1-2, 9-10. Surely that will come as a surprise to the majority of active Ninth Circuit judges who voted to rehear this case en banc (see FED. R. APP. P. 35(a)(2)) on the strength of respondent's petition for *en banc* rehearing, which identified both the state action question and the question whether the use of the polygraph violates the Sixth Amendment as "questions of exceptional importance." C.A. Resp. *En Banc* Reh'g Pet. 1.

Equally mistaken is respondent's mantra that review should be denied because a "factual record has yet to be developed" (Br. in Opp. 2; see also *id.* at 10, 14) and the decision below is "interlocutory" (*id.* at 1, 7, 10, 14, 20). The same, of course, could be said of *any* case coming up on a motion to dismiss where a federal court of appeals has reversed the dismissal of a complaint – including *Polk County* itself. As the same treatise cited by respondent makes clear, this Court regularly reviews interlocutory judgments of federal courts of appeals where, as here, "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari." STERN, GRESSMAN, SHAPIRO & GELLER, SUPREME COURT PRACTICE 258-59 (8th ed. 2002); see, *e.g.*, *Barnes* v. *Gorman*, 536 U.S. 181 (2002); *TRW, Inc.* v. *Andrews*, 534 U.S. 19 (2001); *United Dominion Indus.* v. *United States*, 532 U.S. 822 (2001); *United States* v. *Hatter*, 532 U.S. 557 (2001). And contrary to respondent's suggestion, the *absence* of a complex record – or for that matter any factual

record at all – makes this an *ideal* vehicle for resolving the pure questions of law presented by the petition.

Once this underbrush is cleared away, respondent is left with a hodgepodge of meritless arguments for why the three issues presented do not warrant this Court's attention.

I. THE STATE ACTION QUESTION

According to respondent, the majority's state action ruling – that Chief Public Defender Harris acted under color of state law when he implemented office-wide polygraph and attorney-assignment policies – involves nothing more than the "straightforward application" of the "properly stated rule of law" announced in *Polk County*. That is untrue. *Polk County* explicitly declined to decide whether a public defender acts "under color of state law while performing certain administrative and possibly investigative functions." See 454 U.S. 312, 324-25 (1981). And if the issues raised below were truly "straightforward," they would not have evenly divided the 14 federal judges who were involved in this case in the lower courts.

Far from applying *Polk County*'s holding, the decision below "answers an important question left open by this Court in *Polk County*" – and does so "in a manner that conflicts with the decisions of other circuits." Pet. 9. As we showed in the petition (at 9-11), both the Eighth and Tenth Circuits have refused to treat as "administrative" conduct – qualifying as state action notwithstanding the holding of *Polk County* – "the *policy* of a public defender's office" to "refus[e] * * * to furnish free copies of transcripts to indigents" who are its clients. *Eling* v. *Jones*, 797 F.2d 697, 699 (8th Cir. 1986), cert. denied, 480 U.S. 917 (1987) (emphasis added); see also *Brown* v. *Langdon*, No. 93-8013, 1993 WL 372685, at *1 (10th Cir. Sept. 24, 1993) (rejecting challenge to a similar "*policy* of the Wyoming Public Defenders" and following the Eighth Circuit's holding in the "similar case" of *Eling*). Because there is no valid distinction – and certainly none identified by respondent – between a chief public defender's policy against providing free transcripts to

clients (at issue in *Eling* and *Brown*) and Morgan Harris's alleged policies relating to the assignment of attorneys and the use of polygraph examinations, the Eighth and Tenth Circuits' decisions are squarely in conflict with the decision below.

In an effort to minimize this conflict, respondent first suggests that neither *Eling* nor *Brown* actually involved a "policy" of the public defender's office. See Br. in Opp. 7-9 & nn.1, 2. That is wishful thinking. As the language just quoted shows, both cases *expressly referred* to the Public Defender's Offices' "policy" as the basis for the clients' constitutional claims. Moreover, as respondent neglects to mention, the plaintiffs in *Eling* were multiple prisoners who sued "on behalf of themselves and others similarly situated" (presumably because all members of the putative class had been subjected to the same allegedly unconstitutional policy). *Eling*, 797 F.2d at 698. Thus, it is quite clear from the Eighth Circuit's opinion that the prisoners were challenging a "policy" of the Public Defender's Office and not just (as respondent incorrectly suggests) the individualized or ad hoc decisions of individual public defenders to deny transcript copies to clients "in particular cases." Br. in Opp. 7.

Equally unsuccessful are respondent's efforts to conjure up doubt about whether *Brown* – which challenged the denial of transcripts to a single client by three separate lawyers in the Public Defender's Office – involved an office "policy" (as opposed to coincidental parallel action). According to respondent, there is ambiguity about this because "[t]he only mention of the word 'policy'" in the Tenth Circuit's decision "comes in [the] description of the *points raised by the inmate on appeal*." Br. in Opp. 9 n.2 (emphasis added). Precisely our point. And since the court of appeals went on to *reject* the "points raised by the inmate on appeal," it is difficult to see why this is not unanswerable proof that the case involved a challenge to a "policy."

In any event, respondent's attempt at verbal hairsplitting merely confirms a point we made in the petition (at 12, 20):

there is no claim of ineffective assistance by an individual public defender that cannot be repackaged as a claim challenging some "policy," "practice" or "custom" of a public defender's office. Thus, a definition of state action that hinges on whether an alleged "policy" of the public defender's office was mentioned in the complaint is a definition that allows the holding of *Polk County* to be circumvented with the stroke of a pen.

Respondent also contends that the Tenth Circuit's decision can be disregarded because it was unpublished, and he relatedly emphasizes the "paucity" of reported decisions in this area. This argument overlooks the fact that until the *en banc* decision in this case, the lower courts (including the three-judge panel in this case) were uniformly of the view that claims such as respondent's could *not* be pursued under Section 1983 because of the absence of state action. The Eighth Circuit had said so in *Eling*, and the Tenth Circuit considered the point so obvious that it did not hold oral argument and did not publish its decision. Moreover, as respondent correctly noted in his *en banc* rehearing petition (at 3), there are "abundant suits filed" implicating the holding of *Polk County* but they are "largely unpublished." Thus, it should come as no surprise that only two courts of appeals have published (conflicting) decisions on this issue in recent years. In the wake of the Ninth Circuit's breathtaking expansion of public defender liability, however, that is certain to change. See, *e.g.*, *Harris* v. *Grant*, No. CIV. A. 03-1676, 2003 WL 2006644, at *1 (E.D. Pa. Apr. 30, 2003) (denying public defender's motion to dismiss prisoner's Section 1983 claim alleging that he received "inadequate representation" because of certain office-wide "policies or customs" and citing the Ninth Circuit's *en banc* opinion as authority).

In sum, the conflict is real. The circuits are divided on the question whether policies such as those at issue in this case – which respondent admits involve "the defense of cases" (Br. in Opp. 9) – can give rise to state action because they are "administrative" in nature. The Ninth Circuit answers that question yes;

the Eighth and Tenth Circuits, no. Only this Court can bring uniformity to this critical area of federal law.

II. THE SIXTH AMENDMENT QUESTION

In our petition (at 16-22), we explained that the Ninth Circuit's Sixth Amendment holding – that the alleged resource allocation and attorney assignment policies infringe the right to effective assistance of counsel – cannot be reconciled with *Strickland* v. *Washington*, 466 U.S. 668 (1984), and its progeny. We also showed that the holding is wrong and likely to unleash a wave of new habeas and Section 1983 litigation within the Ninth Circuit as well as in other jurisdictions.

In response, respondent principally argues that the Ninth Circuit should not be faulted for failing to engage in any meaningful analysis of the constitutional issue because "the existence of a Sixth Amendment violation under *Strickland*" was "already * * * established" by a separate Nevada court opinion. Br. in Opp. 11. There are two flaws in this argument.

First, the *en banc* majority did not rely on or even mention the Nevada state court decision granting respondent's habeas petition in its brief discussion of whether petitioner Harris's alleged policies violated the Sixth Amendment. Instead, the majority broadly declared that the alleged "policy [of using polygraphs], while falling short of complete denial of counsel, *is a policy of deliberate indifference* to the requirement that every criminal defendant receive adequate representation, regardless of innocence or guilt." Pet. App. 7a (emphasis added); see also *id.* at 9a-10a (same for attorney assignment policy); Pet. 17-18. For good measure, the *en banc* majority went on to state that the allocation of resources by a public defender's office

> *cannot be based solely or even principally on polygraph results*. In so holding, we *express no opinion* on whether the result of a polygraph test *may be used as one of a number of factors* employed in determining the extent of investigative resources to devote to a particular defendant's

> case. *We hold only that polygraph results cannot be determinative.*

Pet. App. 7a-8a (emphasis added). That certainly reads like a broad declaration of the constitutionality of the polygraph policy, and not, as respondent suggests, a very limited holding that is contingent upon the (unmentioned) fact that respondent had prevailed in his prior habeas challenge. Tellingly, respondent makes no attempt to defend the majority's dubious distinction between resource allocation policies that rely "solely or even principally" on "polygraph results" (which, the majority holds, violate the Sixth Amendment) and policies that rely on polygraphs only as a non-"determinative" factor (which pass muster). Pet. App. 8a.

Beyond simply misreading the Ninth Circuit's opinion, respondent's argument suffers from a second, even more fundamental flaw. It ignores the reason why the Ninth Circuit quite properly chose *not* to rely on the prior habeas proceeding – or on the state court's determination that respondent's "*trial counsel's* performance" (Br. in Opp., App. 6a (emphasis added)) fell short of the Sixth Amendment's requirements. Under *Polk County*, the actions of Thomas Rigsby, the deputy public defender, in handling respondent's criminal case *do not constitute state action*. Indeed, the *en banc* majority so held elsewhere in its opinion. See Pet. App. 4a-5a, 10a, 19a. For that reason, the Ninth Circuit could not have relied – implicitly or otherwise – on Rigsby's decisions and actions in the representation of respondent in evaluating whether the Chief Public Defender's alleged *policies* pass muster under the Sixth Amendment.[1]

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[1] Nor does the state court's habeas decision lend *factual* support to respondent's constitutional challenge to the alleged policies. The Nevada state court did not mention or rely on the alleged attorney assignment or polygraph policies of Chief Public Defender Harris in concluding that "trial counsel's performance," taken as a whole, was inadequate. See Br. in Opp., App. 4a-7a.

Respondent next argues that, consistent with *City of Canton* v. *Harris*, 489 U.S. 378 (1989), he "adequately alleged a policy that amounted to deliberate indifference and that caused the Sixth Amendment violation." Br. in Opp. 13. But *City of Canton* addressed only the "question whether the constitutional deprivation was attributable to a municipal policy or custom[,]" not whether a constitutional violation had occurred. *Collins* v. *City of Harker Heights*, 503 U.S. 115, 123 (1992) (discussing *City of Canton*, 489 U.S. at 388-89). Respondent's contention that *Strickland* is "not the issue" (at 11) is thus mistaken. And no reading of *Strickland* can support the novel Sixth Amendment rights discovered by the *en banc* majority in this case.

Lastly, respondent disputes that the decision below will foment substantial litigation. Br. in Opp. 13-14. Thus, he notes that future damages actions will be limited by *Heck* v. *Humphrey*, 512 U.S. 477, 487 (1994), which says that where a "judgment in favor of the [Section 1983] plaintiff would necessarily imply the invalidity of his conviction or sentence," the plaintiff must first obtain a reversal or invalidation of the conviction before suing under 42 U.S.C. § 1983. This argument puts the cart before the horse. The *immediate* effect of the Ninth Circuit's decision is a flood, not of Section 1983 cases, but of habeas petitions. Under the broad rationale adopted by the Ninth Circuit, for example, virtually *any* former client of the Public Defender's Office of Clark County who claims to have been subjected to the alleged polygraph or attorney assignment policy and is incarcerated can now bring a Sixth Amendment claim challenging his conviction. And, under the Ninth Circuit's broad rationale, many of those challenges (as well as challenges predicated on comparably inventive constitutional theories) are likely to be successful – thus opening the door to future Section 1983 claims notwithstanding *Heck* v. *Humphrey*. And even if this new wave of habeas petitions is unsuccessful, the state and federal courts will still be saddled with

unwarranted habeas claims based on these and similar policies allegedly used by public defenders.[2]

III. THE *MONELL* ISSUE

As we explained (Pet. 22-30), this Court should also review the Ninth Circuit's holding that petitioner *Clark County* can be held liable for the implementation of petitioner *Harris's* policies. That holding is in tension with this Court's municipal liability jurisprudence (including *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978) and *McMillian* v. *Monroe County*, 520 U.S. 781 (1997)) and with the holdings of other circuits. More specifically, the Ninth Circuit gave no explanation – and certainly none based on state law, as is required by *McMillian* – for why Harris should be treated as a final policymaker *for the County* on decisions regarding attorney assignment and resource allocation in the Public Defender's Office. Had the Ninth Circuit majority adhered to the governing legal framework, it would have reached the same conclusion as the four dissenters: "There is no reason to think that the Clark County Board of Commissioners, as opposed to the county public defender, has *any* policy, *or is allowed any say*, as to which lawyers handle which cases in the public defender's office." Pet. App. 16a (emphasis added). In fact, as we have explained (Pet. 28-30), both Nevada law and the federal Constitution protect the functional independence of the

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[2] Respondent mistakenly assumes that only those cases involving the death penalty are affected by the Ninth Circuit's Sixth Amendment holding. See Br. in Opp. 14 (emphasizing small number of "capital defendants" who have won habeas relief). The alleged policy of assigning inexperienced attorneys without providing adequate additional training, however, was not limited to capital cases. See C.A. ER 43, 45 (Cplt. ¶¶ 134, 138) (alleging "a policy, custom, or practice" of "assign[ing] inexperienced and untrained attorneys to capital *and other major felony cases*") (emphasis added). The alleged polygraph policy likewise applied to *all* clients of the Public Defender's Office. And nowhere did the *en banc* majority purport to confine its constitutional rulings to capital cases.

Chief Public Defender in making decisions and setting policies (such as those involved here) that relate to "the defense of cases" (Br. in Opp. 9) and to discharge of his ethical obligation to represent clients zealously.

Respondent offers a variety of responses, most of which seek to divert the Court's attention from the key issue under *Monell*. Thus, he spills much ink (Br. in Opp. 14-15, 16-17, 19) arguing that Harris is a "final" policymaker – even though we conceded that (Pet. 24 n.11) and even though respondent elsewhere admits that this issue is distinct from whether Harris can be said to act *for the municipality* (Br. in Opp. 17). Next, respondent contends (at 17-18) that we are really just challenging whether the Ninth Circuit correctly applied Nevada law to this case. Not so. Our complaint is not that the Ninth Circuit misunderstood or misapplied Nevada law; it is that the Ninth Circuit *ignored* it. That dereliction, we showed, is squarely at odds with this Court's teachings in *McMillian*.

Next, respondent insists that the Ninth Circuit *did* apply Nevada law in holding that petitioner Harris "acts for the county" in setting and applying the alleged policies. According to respondent, the "Ninth Circuit expressly acknowledged the role of state law, citing the very statutes regarding the establishment of public defenders' offices that petitioners claim it ignored." Br. in Opp. 18 (citing NEV. REV. STAT. §§ 180.090, 260.010, 260.040, 260.070, 260.075). That argument is flawed at every turn. Although respondent has identified the lone place in the entire majority opinion where Nevada law is cited (Pet. App. 6a), he misunderstands the Ninth Circuit's use of those citations. The *en banc* majority relied on these five provisions in concluding that petitioner Harris' functions were "administrative" and thus undertaken "under color of state law"; it did not invoke them as evidence that Clark County was properly subject to municipal liability for Harris's conduct.

In any event, the Ninth Circuit did ignore the provisions of Nevada law that count – the ones that establish the functional independence of the Public Defender's Office. Thus, it ignored

the provisions of Nevada law requiring every lawyer to "exercise independent professional judgment and render candid advice" when representing a client (Nev. Sup. Ct. Rule 167), and prohibiting interference with a lawyer's "professional judgment in rendering legal services" by a person or entity paying for such services (Nev. Sup. Ct. Rule 188.3). These rules govern the conduct of the Chief Public Defender, even in setting and implementing the "policies" of the office that will be applied to *all* of his clients. Yet the Ninth Circuit simply ignored these provisions of Nevada law establishing the functional independence of the Chief Public Defender, even though they were specifically called to the court's attention. See C.A. Br. Pet. Harris, at 6.

Finally, we note that respondent does not deny that *federal* law mandates the functional independence of the Chief Public Defender from the County with respect to decisions and policies that are directly related to the office's discharge of its responsibility to serve as a zealous advocate for clients in an adversary role vis-à-vis the State. That alone suffices to defeat municipal liability under the *Monell* principle. Respondent has no answer to this point, and there is none.

Respondent does not disagree that a likely result of the Ninth Circuit's decision is increased control by municipalities over public defenders' policies and practices. Faced with the prospect that they will now be held liable for the implementation of these policies, municipalities will undoubtedly seek to control their content and application. For a municipality attempting to honor its "constitutional obligation * * * to respect the professional independence of the public defenders whom it engages" (*Polk County*, 454 U.S. at 321-22), this is a difficult – if not impossible – task.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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